

Order

**Michigan Supreme Court
Lansing, Michigan**

June 2, 2011

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2009-19

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

Amendment of Rule 7.205
of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.205 of the Michigan Court Rules is adopted, effective September 1, 2011.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

Rule 7.205 Application for Leave to Appeal

(A)-(E)[Unchanged.]

(F) Late Appeal.

- (1) When an appeal of right was not timely filed or was dismissed for lack of jurisdiction, or when an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).
- (2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.
- (3) Except as provided in subrules (F)(4) and (F)(5), leave to appeal may not be granted if an application for leave to appeal is filed more than ~~12~~26 months after the later of:
 - (a) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion

described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the ~~42~~ 6 months are counted from the time of entry of the order denying that motion; or

- (b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period, then the ~~42~~ 6 months are counted from the entry of the order deciding the motion.
- (4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.310(C), MCR 6.419(B), MCR 6.429(B), and MCR 6.431(A), or if
- (a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the ~~42~~ 6-month period,
 - (b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and
 - (c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing or denying the appointment of counsel, the 42-day period runs from the date of that order.

A motion for rehearing or reconsideration of a motion mentioned in subrule (F)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule (F)(4), and the application for leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the

relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

- (5) Notwithstanding the ~~12~~6-month limitation period otherwise provided in subrule (F)(3), leave to appeal may be granted if a party's claim of appeal is dismissed for lack of jurisdiction within 21 days before the expiration of the ~~12~~6-month limitation period, or at any time after the ~~12~~6-month limitation period has expired, and the party files a late application for leave to appeal from the same lower court judgment or order within 21 days of the dismissal of the claim of appeal or within 21 days of denial of a timely filed motion for reconsideration. A party filing a late application in reliance on this provision must note the dismissal of the prior claim of appeal in the statement of facts explaining the delay.
- (6) The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

(G) [Unchanged.]

Staff Comment: The amendment of MCR 7.205 reduces the late appeal period from 12 months to 6 months.

The staff comment is not an authoritative construction by the Court.

MARILYN KELLY, J. (*dissenting*). I respectfully dissent from the Court's order shortening the time for appeal found in MCR 7.205(F) from one year to six months. The majority reduces the appeal period in the belief that Michigan allows more time than other states for a criminal defendant to file a delayed application for leave to appeal. However, because of the differences between Michigan's appeal procedure and that of other states, this belief is unfounded. These differences explain why Michigan's one year timetable is not only appropriate, it is essential.

A criminal defendant in Michigan has 42 days from the date of entry of a final judgment in which to file an appeal as of right. He or she has 21 days to file an appeal by leave. Before today's amendment, if an appeal was not sought within these time limits, a delayed application could be filed within 12 months from the date of entry of the final judgment.¹ This is a two-tiered system but it is not typical of other two-tiered systems.

¹ MCR 7.205(F)(3) states that the appeal must be within 12 months after:

A majority of states with a two-tiered system have a period as long as ninety days in which to appeal. To perfect the appeal in those states, all that need be filed is a notice of intent. The deadline for filing the appellant's brief is tolled until the trial transcripts are filed. The brief is then due within six months.

Michigan's procedures for leave applications differ in two significant ways. First, the time for appeal begins to run from the final judgment and is not tolled for production of the transcript. A defendant may use the deferred appeal period if he or she misses the initial deadlines because preparation of the transcript is delayed.

Second, Michigan requires an appeal by leave to be made on the merits.² Hence, the appealable issues must be identified before the appeal can be filed. And in order to identify the issues, counsel must have the trial transcript. Therefore, the time for appeal by leave in Michigan must be longer than in states that do not require the issues to be identified when the appeal is filed.

According to the State Appellate Defenders Office, in a significant percentage of the cases in which it seeks leave, the transcripts are not completed before the 21-day appeal deadline expires. In fact, the cases are well into the delayed application period before counsel knows if there is any legal basis for an appeal.

Thus, the difference between Michigan's procedures and those of states requiring only a notice of intent to perfect an appeal is highly significant. And it explains why

(a) entry of a final judgment or other order that could have been the subject of an appeal or right under MCR 7.203(A), but if the motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the 12 months are counted from the entry of the order denying that motion [motion for new trial, rehearing or reconsideration or other post-judgment relief]; or

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period, then the 12 months are counted from the entry of the order deciding the motion.

² MCR 7.205(B).

there is no sound basis to lower Michigan's appeal period for delayed applications from one year to six months.

Lowering the appeal period for leave cases to six months does not bring Michigan's appeal period into conformity with the appeal period of other states. Moreover, the amendment renders Michigan's rule far more oppressive on appellants than is currently the case.

CAVANAGH and HATHAWAY, JJ., joined the statement of MARILYN KELLY, J.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 2, 2011

Corbin R. Davis

Clerk